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IN THE

Supreme Court of the United States

CITIZENS FOR POLICE ACCOUNTABILITY POLITICAL COMMITTEE,

Petitioner,

—and—

FLORIDA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Petitioner,

—v.—

KURT S. BROWNING, in his capacity as Secretary of State of the State of Florida,

Respondent,

—and—

SHARON L. HARRINGTON, in her official capacity as Supervisor of Elections, Lee County,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In what circumstances does the First Amendment permit a State to ban petition circulation among voters as they exit polling places? Specifically:

> Did the Eleventh Circuit Court of Appeals improperly extend and apply the plurality opinion in *Burson v. Freeman*, 504 U.S. 191 (1992), when it reversed the district court and upheld the constitutionality of Florida Statutes Section 102.031(4) (2008) as applied to Petitioners' exit-only petition circulation?
>
> Is Florida Statutes Section 102.031(4) unconstitutional as applied to prohibit Petitioners' exit-only petition circulation where the same statute specifically permits media and non-media exit polling?

PARTIES TO THE PROCEEDING

Petitioners are Citizens for Police Accountability Political Committee and Florida State Conference of the National Association for the Advancement of Colored People, Plaintiffs-Appellees below. Respondents are Kurt S. Browning, in his official capacity as Secretary of State of the State of Florida, and Sharon L. Harrington, in her official capacity as Supervisor of Elections, Lee County, Defendants-Appellants below.

RULE 29.6 DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Citizens for Police Accountability Political Committee has no parent, subsidiary or affiliated corporations. Petitioner Florida State Conference of the NAACP is a unit of the National NAACP, which is a nonprofit corporation incorporated in New York with its principal place of business in Maryland. It does not issue stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 DISCLOSURE ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTIONAL GROUNDS 1

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE AND FACTS 4

Introduction 4

The Challenged Law 5

Petitioners' First Amendment Speech 7

The District Court Proceedings 8

Petitioners' Evidence in the District Court 9

Respondent's Evidence in the District Court 11

The District Court Grants the Preliminary Injunction 11

TABLE OF CONTENTS - Continued

Page

The Eleventh Circuit Reverses 13

WHY THE WRIT SHOULD BE GRANTED..... 14

1. The Writ Should Be Granted so that the Court May Resolve Uncertainty About the Exercise of First Amendment Rights near Polling Places..... 16

2. The Writ Should Be Granted Because the Eleventh Circuit's Opinion Erroneously Establishes a Standard Under Which "Exit Polling" Is Entitled to Greater First Amendment Protection than Other Exit Speech. 24

CONCLUSION..... 28

APPENDIX

25 June 2009 Eleventh Circuit Opinion 1a

22 August 2008 District Court Opinion and Order..... 19a

22 August 2008 District Court Preliminary Injunction 42a

4 September 2009 Eleventh Circuit Order Denying Rehearing 45a

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Amer. Broad. Co. v. Blackwell,
479 F. Supp. 2d 719 (S.D. Ohio 2006) 21

Amer. Broad. Co. v. Heller,
No. 2:06-CV-01268-PMP-RJJ,
2006 WL 3149365 (D. Nev. Nov. 1, 2006) 20

Amer. Broad. Co. v. Ritchie, No. 08-5285,
2008 WL 4635377 (D. Minn. Oct. 15, 2008) 20

Amer. Broad. Co. v. Wells,
--- F. Supp. 2d ---, 2009 WL 3417589 (D.N.J.
Oct. 23, 2009) 21, 22

Anderson v. Spear,
356 F.3d 651 (6th Cir. 2004) 26, 27

Beacon Journal Publ'g Co. v. Blackwell,
389 F.3d 683 (6th Cir. 2004) 21

Buckley v. Amer. Constitutional *Law Found., Inc.*,
525 U.S. 182 (1999) 5, 15, 17

Burson v. Freeman,
504 U.S. 191 (1992) ..... passim

Caperton v. A.T. Massey Coal Co., Inc.,
129 S. Ct. 2252 (2009) 16

TABLE OF AUTHORITIES - Continued

Page

Carey v. Brown,
447 U.S. 455 (1980) 26

CBS Broad., Inc. v. Cobb,
470 F. Supp. 2d 1365 (S.D. Fla. 2006) 6, 11, 21

CBS, Inc. v. Smith,
681 F. Supp. 794 (S.D. Fla. 1988) 6

Clean-Up '84 v. Heinrich,
582 F. Supp. 125 (M.D. Fla. 1984) 6

Clean-Up '84 v. Heinrich,
590 F. Supp. 928 (M.D. Fla. 1984) 5, 6

Clean-Up '84 v. Heinrich,
759 F.2d 1511 (11th Cir. 1985) 6

Cohen v. California,
403 U.S. 15 (1971) 27

Eu v. *San Francisco Cty. Democratic Cent. Comm.*,
489 U.S. 214 (1989) 14

Fla. Comm. For Liability Reform v. McMillan,
682 F. Supp. 1536 (M.D. Fla. 1988) 6

Meyer v. Grant,
486 U.S. 414 (1988) 15, 17

TABLE OF AUTHORITIES - Continued

Page

Roth v. United States,
354 U.S. 476 (1957) 5

Schirmer v. Edwards,
2 F.3d 117 (5th Cir. 1993) 19, 20

Tashjian v. Republican Party of Conn.,
479 U.S. 208 (1986) 15

Turner Broad. Sys., Inc. v. FCC,
512 U.S. 622 (1994) 26

U.S. v. Playboy Entm't Group, Inc.,
529 U.S. 803 (2000) 27

United Food & Commercial Workers Local 1099 v. City of Sidney,
364 F.3d 738 (6th Cir. 2004) 19, 20

STATE CASES

Caperton v. A.T. Massey Coal, Inc.,
679 S.E.2d 223 (W. Va. 2008), *rev'd*, 129 S. Ct. 2252 (2009) 25

In re: Attorney General's "Directive on Exit Polling: Media and Non-partisan Public Interest Groups,"
981 A.2d 64 (N.J. 2009) 21

State v. Schirmer,
646 So. 2d 890 (La. 1994) 20

TABLE OF AUTHORITIES - Continued

Page

FEDERAL STATUTES

28 U.S.C. § 1254(1) (2006) 1

42 U.S.C. § 1983 (2006) 3, 8

STATE STATUTES

Fla. Stat. § 102.031(4) (2008) ..... passim

Fla. Stat. § 102.031(4) (2006) 6, 7

Fla. Stat. § 102.031 (1990) 6

Fla. Stat. § 166.031(1) (2008) 10, 17

CONSTITUTIONAL PROVISIONS

First Amendment, United States Constitution 2

Fourteenth Amendment, Section One, United States Constitution 2

OTHER AUTHORITIES

John G. Matsusaka, *For the Many or the Few* (2004) 15

OPINIONS BELOW

The district court's Opinion and Order is reported as *Citizens for Police Accountability Political Committee v. Browning*, 581 F. Supp. 2d 1164 (M.D. Fla. 2008), and reproduced in the Appendix at 19a-41a.

The district court's Preliminary Injunction is *Citizens for Police Accountability Political Committee v. Browning*, Case No. 2:08-cv-635-FtM-29SPC (M.D. Fla. Aug. 22, 2008), and is reproduced in the Appendix at 42a-44a.

The Eleventh Circuit's opinion is reported as *Citizens for Police Accountability Political Committee v. Browning*, 572 F.3d 1213 (11th Cir. 2009), and reproduced in the Appendix at 1a-18a.

The Eleventh Circuit's Order Denying Rehearing is *Citizens for Police Accountability Political Committee v. Browning*, Case. No. 08-15115 (11th Cir. Sept. 9, 2009), and is reproduced in the Appendix at 45a-46a.

JURISDICTIONAL GROUNDS

Jurisdiction is proper in this Court. 28 U.S.C. § 1254(1) (2006). Petitioners, Citizens for Police Accountability Political Committee ("CPAPC") and Florida State Conference of the National Association for the Advancement of Colored People ("Florida NAACP") (collectively "Petitioners"), seek review of the Eleventh Circuit Court of Appeals' opinion reversing the district court's grant of a preliminary

injunction. The district court entered the preliminary injunction after a hearing at which the court found, among other things, that Petitioners had a substantial likelihood of success on the merits of their as-applied constitutional challenge to Florida Statutes Section 102.031(4)(a)-(b) (2008). The Eleventh Circuit reversed the district court order on June 25, 2009, and denied Petitioners' timely motion for rehearing on September 9, 2009. Petitioners' initial deadline for filing this Petition for Writ of Certiorari was December 3, 2009, but Petitioners sought and were granted an extension of time to January 15, 2010 to file it.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment, United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment, Section One, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

> any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 (2006):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Florida Statutes Section 102.031(4)(a)-(b) (2008):

(4)(a) No person, political committee, committee of continuous existence, or other group or organization may solicit voters inside the polling place or within 100 feet of the entrance to any polling place, or polling room where the polling place is also a polling room, or early voting site. Before the opening of the polling place or early voting site, the clerk or supervisor shall designate the no-solicitation zone and mark the boundaries.

(b) For the purpose of this subsection, the terms "solicit" or "solicitation" shall include, but not be limited to, seeking or attempting to seek any vote, fact, opinion, or contribution; distributing or attempting to distribute any political or campaign material, leaflet, or handout; conducting a poll except as specified in this paragraph; seeking or attempting to seek a signature on any petition; and selling or attempting to sell any item. The terms "solicit" or "solicitation" shall not be construed to prohibit exit polling.

STATEMENT OF THE CASE AND FACTS

Introduction

The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

Roth v. United States, 354 U.S. 476, 484 (1957). Contrary to this principle, the State of Florida interferes with the exchange of ideas by banning the solicitation of petition signatures near polling places from persons both before and *after* they have voted. Fla. Stat. § 102.031(4)(a)-(b) (2008). This prohibition imposes severe burdens upon Petitioners' ability to have their proposed amendment placed on a ballot. *See Buckley v. Amer. Constitutional Law Found., Inc.*, 525 U.S. 182, 208 (1999) (Thomas, J. concurring) (restrictions on petition circulation "plainly impose a 'severe burden' ").

The Eleventh Circuit's opinion, which reversed the granting of a preliminary injunction by the district court and which upheld the constitutionality of Section 102.031(4)(a)-(b) as applied to Petitioners' speech, is based upon an erroneous legal standard and creates significant confusion about the protections afforded by the First Amendment. The Court should review this case because it presents important questions of constitutional law that this Court has not yet addressed, but should.

The Challenged Law

In 1977, the Florida Legislature for the first time sought to regulate petition circulation outside of polling places. The impetus behind this restriction was a disgruntled Legislature reacting to the Governor's "successful drive to place a financial disclosure law on the ballot through the initiative process." *Clean-Up '84 v. Heinrich*, 590 F. Supp. 928, 929 (M.D. Fla. 1984). In 1984 and again in 1988, petition circulators and media exit pollsters brought a

series of successful constitutional challenges to the precursors of Section 102.031(4)(a)-(b). *Clean-Up '84 v. Heinrich*, 759 F.2d 1511, 1514 (11th Cir. 1985) (petition circulation); *CBS, Inc. v. Smith*, 681 F. Supp. 794, 796 (S.D. Fla. 1988) (exit polling); *Fla. Comm. For Liability Reform v. McMillan*, 682 F. Supp. 1536, 1540-42 (M.D. Fla. 1988) (petition circulation); *Clean-Up '84 v. Heinrich*, 590 F. Supp. 928, 934 (M.D. Fla. 1984) (petition circulation); *Clean-Up '84 v. Heinrich*, 582 F. Supp. 125, 127 (M.D. Fla. 1984) (petition circulation).

Because Florida's laws regulating petition circulation and exit polling were constitutionally infirm, Florida revised its laws so that, between 1989 and 2005, Florida permitted such activity within certain areas near polling places. *E.g.*, Fla. Stat. § 102.031 (1990). As a result, from 1989 to 2005, Florida's polling place laws were not challenged in court.

In 2005, the Florida Legislature enacted a new statute that prohibited petition circulating and exit polling, among others things, within a 100-foot zone around polling place entrances. 2005 Fla. Laws Chap. 2005-277 § 54 (codified at Fla. Stat. § 102.031(4)(a)-(b) (2006)). In 2006, a consortium of media entities successfully challenged that statute as applied to media exit polling, and the United States District Court for the Southern District of Florida enjoined its enforcement. *CBS Broad., Inc. v. Cobb*, 470 F. Supp. 2d 1365, 1366 (S.D. Fla. 2006). The State did not appeal that ruling. In 2008, the Florida Legislature amended the statute to permit exit polling. 2008 Fla. Laws Chap. 2008-95 § 25 (codified

at Fla. Stat. § 102.031(4)(a)-(b) (2008)). The statute enacted in 2008 (the "Challenged Law") provides no definition of "exit polling" and permits anyone, not just the media, to engage in "exit polling." (App. at 24a.)

With the exception of "exit polling," however, the Challenged Law forbids the solicitation of voters within 100 feet of Florida polling places and early voting sites (the "No Approach Zone"). *See* Fla. Stat. § 102.031(4)(a). The Challenged Law defines "solicitation" to include various types of speech directed at voters, including "seeking or attempting to seek a signature [from a voter] on any petition." *Id.* § 102.031(4)(b).

Petitioners' First Amendment Speech

Petitioners are the advocates for and circulators of a petition seeking an amendment to the Fort Myers, Florida, City Charter. (R 1:2, 5.)[1] The proposed amendment's purpose was to create a citizens' oversight panel for the City's police department. (App. at 20a.) Petitioner CPAPC began circulating the petition in August 2007. (*Id.*)

Because of the high concentration of registered voters at polling places, CPAPC sought to gather signatures at polling places during the Presidential Preference Primary held on January 29, 2008. (R 1:5.) CPAPC's efforts were stymied, however, because instead of being able to discuss their petition with

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[1] The Record will be cited as "(R#:Pg#.)."

voters, CPAPC petition circulators could only watch as voters parked their cars within the No Approach Zone, entered the polling places, and returned to their cars. (*Id.* at 5-6.)

In April 2008, the Florida NAACP joined CPAPC in circulating the petition. (*Id.* at 6.) Despite their combined efforts, by summer 2008 Petitioners had not obtained the required number of signatures from the City's registered voters. (*Id.*)

The District Court Proceedings

On August 11, 2008, pursuant to 42 U.S.C. § 1983 (2006), and in anticipation of the August 26, 2008 primary election, Petitioners filed in the United States District Court for the Middle District of Florida a Verified Complaint and Motion for Preliminary Injunction supported by affidavits and attached exhibits. (R 1,2.) For purposes of this Petition for Writ of Certiorari, Petitioners' most important claims were for a declaration that the Challenged Law was unconstitutional as applied to Petitioners' efforts to obtain signatures from *exiting voters* and for an injunction against enforcement of the Challenged Law. (R 1:10-12.) Respondents filed a response to the Motion, including affidavits (R 11), and the district court heard oral argument on August 21, 2008. On August 22, the district court issued an Opinion and Order as well as a Preliminary Injunction prohibiting enforcement of the Challenged Law against Petitioners' exit petitioning during the August 26, 2008 primary election. (App. at 19a-44a.)

Petitioners' Evidence in the District Court

In the district court, Petitioners presented a variety of statistical, geographic, and affidavit evidence demonstrating that polling places are the best location to gather petition signatures, that the Challenged Law severely burdened Petitioners' efforts to gather petition signatures, and that petition circulation had not caused voter intimidation, fraud, or any other electoral abuses near Florida's polling places.

Petitioners presented three different sets of statistical evidence, all of which were gathered during the period when Florida permitted petition circulation and other types of speech within the No Approach Zone. The first set of statistics showed an increase in voter participation from the 2000 to the 2004 presidential elections both statewide and in Lee County, where Fort Myers is located. (R 2-3:1-2.) The second set contained a review of more than 5,000 complaints logged in the Election Incident Reporting System from Florida voters during the 2004 presidential election, none of which involved petition circulation, even though petition circulation was permitted near Florida polling places at that time. (*Id.* at 2-3.)

The third set of statistics contained a survey conducted during the 2004 presidential election regarding voters' experiences in Florida. (*Id.*) No voters mentioned petition circulation as a problem near polling places. (*Id.*)

Petitioners also provided the district court with the results of a public records request to Supervisor

Harrington for "[a]ll voter complaints regarding activity outside the polling places in Lee County, Florida, including, but not limited to exit polling, petition circulation, and other forms of solicitation, from January 1, 2000 to the present." (*Id.* at 4.) Supervisor Harrington's response provided only one e-mail string, and that e-mail string did not relate to petition circulation. (*Id.*) In other words, for more than eight years, including during a period of more than four years when petition circulation was permitted, there were no public records of complaints in Lee County regarding petition circulation at polling places.

Petitioners further submitted to the district court maps of three polling places in Fort Myers showing that the No Approach Zones not only encompassed many parking places, but also included public sidewalks and public roads. (*Id.* at 4-5.)

Finally, Petitioners provided the district court with the declaration of Dr. Matthew Corrigan, a professor and department head from the University of North Florida Department of Political Science and Public Administration, which concluded that polling places were the best place for petition circulation based upon three findings. (R 2-2:1-2.) First, only registered voters from Fort Myers may vote in polling places within the City, and those voters are the same people needed to sign a petition to amend the Fort Myers City Charter. *See* Fla. Stat. § 166.031(1) (2008). Second, citizens who are politically active in their community, including those who vote, are twice as likely to sign a petition as those who are not politically active. (R 2-2:2.) Third, as with exit

polling, the greater the distance from a polling place that petition circulators are made to stand, the less likely they are to be successful. (*Id.* at 3.)

Respondent's Evidence in the District Court

In contrast to Petitioners' evidence, Respondents provided only anecdotal affidavit evidence. (R 11:16.) Supervisor Harrington proffered her own affidavit, which had attached to it a 2006 affidavit of then Supervisor Browning.[2] (R 11-2.) Supervisor Harrington stated that in her experience, "any diminution of th[e] 100 foot protection will disrupt voters, cause increased dissatisfaction with the voting process, and suppress voter turnout." (R 11-2:3.) Secretary Browning's affidavit reached a similar conclusion. (*Id.* at 7.) Both affidavits discussed Respondents' beliefs regarding the "cumulative effect" of activity outside of polling places and the effect on voters having to "run the gauntlet." (*Id.* at 2, 7.) Neither affidavit identified any specific voters who had complained or specific problems that had occurred at any polling place. Nor was either affidavit supported by any documentary evidence.

The District Court Grants the Preliminary Injunction

Because the Challenged Law is a content-based restriction on First Amendment rights – *i.e.*, a

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[2] The 2006 affidavit originally had been offered by then Supervisor Browning in a lawsuit over the predecessor to the Challenged Law, *CBS Broadcasting, Inc. v. Cobb*, 470 F. Supp. 2d 1365 (S.D. Fla. 2006).

restriction on Petitioners' rights of free speech and association – the district court looked to this Court's plurality opinion in *Burson v. Freeman*, 504 U.S. 191 (1992), for guidance on how to assess it. Utilizing the strict scrutiny test employed by the *Burson* plurality, the district court first found that the State has a compelling interest in conducting elections with integrity and reliability and in protecting voters from intimidation, confusion, and election fraud. (App. at 26a.) But, the district court concluded, Respondents did not show that the Challenged Law satisfied either of the other strict scrutiny requirements. (*Id.* at 35a.)

Specifically, the district court explained that there was ample historical evidence of electoral abuses caused by candidates and campaign workers seeking to influence the outcome of elections. (*Id.*) But,

> [t]he evidence submitted by the parties in this case . . . fails to establish electoral abuses perpetrated by other exit solicitors or exit polling. Therefore, at this stage of the proceedings, there has not been a sufficient showing that the restriction on exit petitioning is necessary.

(*Id.*) The district court also found that, because of the nature of Petitioners' speech – peaceful, orderly, non-disruptive, and directed only at exiting voters – the Challenged Law was not narrowly tailored. (*Id.* at 36a.)

Based upon these findings, the district court issued the preliminary injunction prohibiting enforcement of the Challenged Law against

Petitioners' exit petitioning at polling places in Lee County on August 26, 2008.[3] Respondents appealed.[4]

The Eleventh Circuit Reverses

The Eleventh Circuit reversed the district court's preliminary injunction. (App. at 3a.) After discussing the *Burson* decision and noting that, because of factual differences, *Burson* did not bind it, the Eleventh Circuit undertook the three-pronged strict scrutiny analysis. (App. at 7a-17a.) The appellate court found that the State's compelling interest was the same as in *Burson*: "(1) protecting voters from confusion and undue influence; and (2) preserving the integrity of the election process." (App. at 11a.) In contrast with the district court, however, the Eleventh Circuit did not consider the evidence presented in the lower court in evaluating the necessity requirement.[5] Instead, it rejected

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[3] The district court also found that Petitioners had satisfied the other requirements for granting a preliminary injunction.

[4] After circulating their petition on August 26, 2008, Petitioners gathered the necessary number of signatures to place their issue on the ballot. As a result, the district court, on December 1, 2008, found that there was no live case or controversy pending and dismissed the case as moot. (R 39:2.) The Eleventh Circuit found on appeal that the case was not moot because it was capable of repetition, yet evading review. (App. at 5a-6a n.5.)

[5] The Eleventh Circuit did *not* rule that the district court's findings of fact were clearly erroneous; therefore, those findings of fact stood on appeal. Nevertheless, the Eleventh Circuit accepted the State's evidence regarding the effect on some voters

(continued on the following page)

> the contention that the State *must offer its own evidence* demonstrating that the ban on exit solicitation is necessary to serve its compelling interest; our country's long history of election regulation, the consensus emerging from that history, and the practical need to keep voters and voting undisturbed all prove that the ban is warranted.

(App. at 16a. (emphasis added).) On the final prong of the strict scrutiny test, the Eleventh Circuit, unlike the district court, found that the Challenged Law was reasonable and did not significantly impinge on constitutionally protected rights. (App. at 16a-17a.) As a result, the Eleventh Circuit reversed the district court. (App. at 18a.)

WHY THE WRIT SHOULD BE GRANTED

This case concerns the State of Florida's effort to ban core political speech in the form of petition circulation, and the question of whether such a ban can be upheld in the absence of historical or record evidence that it is necessary to serve a compelling State interest. More fundamentally, it concerns the interplay between vital First Amendment rights and the State's right to regulate elections. *See, e.g., Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989) (explaining that the State's interest in regulating elections "does not extinguish the

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of having to "run the gauntlet," but made no mention of the evidence presented by Petitioners. (App. at 15a n.14.)

State's responsibility to observe the limits established by the First Amendment rights of the State's citizens") (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986)).

Petition circulation is a form of core political speech in which First Amendment protections undoubtedly are at their "zenith." *Buckley v. Amer. Constitutional Law Found., Inc.*, 525 U.S. 182, 186-87 (1999); *Meyer v. Grant*, 486 U.S. 414, 421-22, 425 (1988). It has been an important form of direct, grassroots democracy for more than a century, predating women's suffrage, presidential term limits, the federal income tax, and social security. John G. Matsusaka, *For the Many or the Few* 1 (2004).

Despite these facts, the Eleventh Circuit's opinion treats petition circulation as a second-class right. Indeed, the first sentence of the Eleventh Circuit's opinion – "This appeal is about voting" – fails even to acknowledge that any form of political expression other than voting itself is at issue in this case. (*See* App. at 2a.) In reality, this case is about much more than voting; it is about the proper equilibrium between the fundamental right to vote and the fundamental rights of free speech and association involved in petition circulation.

As a result, this case presents the Court with an ideal opportunity to articulate the correct balance between these fundamental constitutional rights. As discussed in greater detail below, in the 17 years since this Court's plurality decision in *Burson v. Freeman*, federal and state courts have struggled to find this balance, often taking incompatible approaches to resolving the tension between the

exercise of free speech rights near polling places and the State's right to regulate elections. "The principal purpose of this Court's exercise of its certiorari jurisdiction is to clarify the law." *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2274 (2009) (Scalia, J., dissenting) (citing Supreme Court Rule 10). By granting the writ, the Court can do just that.

The writ also should be granted because the Eleventh Circuit's opinion erroneously establishes a new standard under which "exit polling" is entitled to greater First Amendment protection than other equally important political speech. By granting the writ, the Court can rectify this error.

1. The Writ Should Be Granted so that the Court May Resolve Uncertainty About the Exercise of First Amendment Rights near Polling Places.

Here, Petitioners attempted to seek petition signatures outside of Florida polling places only from exiting voters and only on an issue that was not on the ballot. (App. at 36a.) In other words, Petitioners did not seek to speak to voters before they voted, and did not seek to influence votes or the outcome of the present election. The evidence in support of these facts was uncontradicted.

Moreover, as the record below made clear, polling places are the best locations to seek petition signatures because of the high concentration of

registered, politically active voters.[6] (R 2-2:2-4.) The Challenged Law has effectively cordoned off petition circulators from this crucial location and, in so doing, has diminished the likelihood that petition circulators will gather the requisite number of signatures necessary to place their initiative proposals on state or local ballots. *Cf. Buckley*, 525 U.S. at 210-11 (Thomas, J., concurring) (citing *Meyer*, 486 U.S. at 422-23) (reducing the audience that petition circulators might reach "made it less likely that initiative proposals would garner the signatures necessary to qualify for the ballot").

Despite these facts, the Eleventh Circuit upheld the Challenged Law and improperly extended this Court's plurality holding in *Burson v. Freeman*, 504 U.S. 191 (1992). In *Burson*, a campaign worker brought a facial challenge to Tennessee's ban on solicitation of votes within 100 feet of polling places. 504 U.S. at 193-94. Specifically, the Tennessee statute created a 100-foot "campaign-free zone" that excluded "campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position." *Id.* Because of the narrow scope of the Tennessee statute, *Burson* addressed a limited question – whether the statute, "which pro-hibit[ed] the solicitation of votes and the display or distribution of campaign materials within

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[6] To be placed on the ballot, petitions must be "signed by 10 percent of the registered electors as of the last preceding municipal general election." Fla. Stat. § 166.031(1) (2008).

100 feet of the entrance to a polling place, violate[d] the First and Fourteenth Amendments." *Id.* at 193.

Based upon an historical record of election abuses caused by candidates and their campaign workers, and considering only a facial constitutional challenge to the Tennessee statute, the *Burson* plurality held that a state could, consistent with the First Amendment, prohibit the display and distribution of campaign material within 100 feet of a polling place on election day. *Id.* at 211. But the *Burson* plurality left open the question of whether other types of speech could be prohibited near polling places consistent with the Constitution.[7] The *Burson* plurality also left open the possibility of a successful as-applied challenge to the Tennessee statute. *Id.* at 210 n.13.

Because of *Burson*'s narrow focus on speech by candidates and their campaign workers, it has proven difficult for courts to apply consistently in cases involving restrictions on other types of polling place speech.

For example, in petition circulation cases involving both entering and exiting voters, some

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[7] Indeed, the Tennessee statute at issue in *Burson* actually permitted the very same First Amendment speech barred by Florida's Challenged Law – *i.e.*, the circulation of petitions for the placement of an issue on a future ballot. *See* Brief of Respondent at 11, *Burson v. Freeman*, 504 U.S. 191 (1992) (No. 90-1056), 1991 WL 533556. *See also Burson*, 504 U.S. at 223 (Stevens, J., dissenting) (noting that Tennessee's statute did not prohibit "political debate and solicitation concerning issues or candidates not on the day's ballot").

courts have taken a broad view of *Burson*. These cases seem to be based on the unspoken assumption that petition circulators are the First Amendment equivalents of the candidates and campaign workers prohibited from seeking votes near polling places in *Burson*. In *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738 (6th Cir. 2004), for instance, the court engaged in a cursory, one-paragraph analysis of *Burson* and, based upon that analysis, concluded that because *Burson* upheld a ban on the distribution of campaign material seeking votes, it necessarily followed that "a state may require persons *soliciting signatures* to stand 100 feet from the entrances to polling places without running afoul of the constitution." *Id.* at 748 (emphasis added). In *Burson*, the plurality found that the state's prohibition on campaigning within the 100-foot zone was based upon "ample evidence that political candidates have used campaign workers to commit voter intimidation or electoral fraud." *Id.* (plurality). The *United Food* court, by contrast, cited no evidence that *petition circulators* have had any impact on elections.

Likewise, in *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993), the court upheld Louisiana's ban on petition solicitation and other speech within 600 feet of polling places, based upon evidence that campaigns had hired poll workers to "inundate" voters with campaign material near polling places, and that these efforts had had a negative impact on the election process. *Id.* at 121. Rather than requiring evidence that petition circulators had interfered with elections, the *Schirmer* court accepted the State's argument

that candidates and their workers might pose as non-ballot political speakers in order to reach voters within the 600-foot zone. *Id.* at 123. The *Schirmer* court agreed with the State that it should not have to police the authenticity of purported non-ballot speakers, but instead could simply ban all political speech near polling places. *Id.*[8]

Neither *United Food* nor *Schirmer*, however, examined the important issue raised by this case: whether petition circulation limited to *exiting voters* can be constitutionally prohibited. Moreover, the Eleventh Circuit's opinion is in conflict with a series of decisions about speaking to exiting voters.

After *Burson*, courts that have addressed prohibitions on speech to exiting voters have repeatedly found such prohibitions unconstitutional because there is no historical or record evidence demonstrating a negative impact on elections from post-voting speech. *See, e.g., Amer. Broad. Co. v. Ritchie*, No. 08-5285, 2008 WL 4635377, at *6 (D. Minn. Oct. 15, 2008) (explaining that the State had presented no evidence that questioning voters *after* voting had a detrimental effect on voting); *Amer. Broad. Co. v. Heller*, No. 2:06-CV-01268-PMP-RJJ, 2006 WL 3149365, at *12 (D. Nev. Nov. 1, 2006) (finding a lack of evidence that *exit* polling had deterred, harassed, or disrupted voters); *CBS Broad.*,

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[8] Contrary to the Fifth Circuit, the Louisiana Supreme Court, relying on *Burson*, later found the 600-foot campaign-free zone unconstitutional. *See State v. Schirmer*, 646 So. 2d 890, 901 (La. 1994).

Inc. v. Cobb, 470 F. Supp. 2d 1365, 1370 (S.D. Fla. 2006) (finding it important that "voters are only approached *after* they have voted") (emphasis added); *Amer. Broad. Co. v. Blackwell*, 479 F. Supp. 2d 719 (S.D. Ohio 2006) ("By definition, exit polling affects only those who have *already voted*.") (emphasis added).

One circuit court of appeals has gone even farther in protecting the media's right to speak near polling places. In *Beacon Journal Publishing Co. v. Blackwell*, 389 F.3d 683, 685 (6th Cir. 2004), the court found that the media must have "reasonable access to any polling place for the purpose of news-gathering and reporting so long as [they] do not interfere with poll workers and voters as voters exercise their right to vote." The *Beacon Journal* court did not limit its holding to exit polling; the state was required to permit the media to poll voters both before and after they voted.

Two recent decisions from New Jersey exemplify the inconsistent approaches courts have taken to applying *Burson*. On September 30, 2009, the New Jersey Supreme Court held that New Jersey could constitutionally ban exit pollsters from the area outside polling places. *In re: Attorney General's "Directive on Exit Polling: Media and Non-partisan Public Interest Groups," Issued July 18, 2007*, 981 A.2d 64, 80-81 (N.J. 2009). In fact, the court went so far as to hold that the state could prohibit "all expressive activity" near polling places. *Id.* at 82.

After the New Jersey Supreme Court's decision, the media challenged the New Jersey statute in federal court. *See Amer. Broad. Co. v. Wells*, --- F.

Supp. 2d ---, 2009 WL 3417589 at *1 (D.N.J. Oct. 23, 2009). The district court found that there was "no evidence on the record that exit pollsters have been engaged" in any disruptive conduct, and therefore struck down the ban on exit polling as unconstitutional. *Id.* at *4. The lack of evidence supporting the ban was not the only reason for finding the ban on exit polling unconstitutional.

> Even more persuasive is the fact that the exit polling takes place after individuals vote. Voters are not approached entering polling places – and it is conduct affecting voters on their way to the polls that the government may have an interest in protecting.

Id.

Like the divergent views taken by the two New Jersey courts, the Eleventh Circuit's opinion – which failed to take account of the timing of Petitioners' speech – is diametrically opposed to the holding of the District Court for the Southern District of Florida in *CBS Broadcasting, Inc. v. Cobb*. The two cases involved nearly identical statutes and nearly identical facts. The difference between the cases was simply that one involved media exit polling and the other involved exit petitioning. The *Cobb* court weighed the evidence, considered the speech at issue, and found Florida's ban on solicitation of voters unconstitutional as applied to media exit pollsters because it was not necessary or narrowly tailored. 470 F. Supp. 2d at 1371-72. Here, instead of looking at the evidence proffered by the parties, the Eleventh Circuit ignored the evidence submitted by Petitioners (and accepted

by the district court), and instead equated petition circulators with the ballot candidates whose speech could be restricted under *Burson*. (App. at 13a.) The Eleventh Circuit failed to pay heed to the fact that speech directed only toward exiting voters does not implicate the State's interest in preventing voter fraud or intimidation.

In conjunction with the two recent New Jersey decisions, the Eleventh Circuit's opinion both demonstrates the lower courts' confusion in applying *Burson* and raises numerous questions. Does the decision on whether speech can be banned near polling places depend upon the identity of the speaker (*i.e.*, whether the speaker is a member of the media)? Does it depend on the timing of the speech (*i.e.*, whether the speech occurs before or after voting)? Does it matter whether any historical or record evidence demonstrates that a particular type of speech has misled voters or interfered with elections? Despite all relying upon *Burson*, the courts offer conflicting answers to these critical questions.[9]

This case is in many respects a hybrid of the exit polling and petition circulation cases decided since *Burson*. Like the petition circulation cases, this case plainly concerns political speech near polling places; but, like the exit polling cases, this case concerns only post-voting interaction with voters. And, critically, the record evidence in this case is that

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[9] This is due in large measure to the narrow focus of the *Burson* decision. Indeed, as the Eleventh Circuit noted in its opinion, "*Burson* does not bind us here." (App. at 11a.)

petition circulators in Florida have not caused any electoral abuses. (App. at 35a.) As a result, this case presents an ideal opportunity for this Court not only to examine and articulate the proper balance between the State's right to regulate elections and the citizenry's right to engage in grassroots democracy, but also to provide much needed guidance to the lower courts on the meaning of *Burson* with respect to this unsettled area of constitutional jurisprudence.

2. The Writ Should Be Granted Because the Eleventh Circuit's Opinion Erroneously Establishes a Standard Under Which "Exit Polling" Is Entitled to Greater First Amendment Protection than Other Exit Speech.

The Challenged Law prohibits individuals from seeking petition signatures near polling places, but expressly permits "exit polling." *See* Fla. Stat. § 102.031(4)(b) ("The terms 'solicit' or 'solicitation' shall not be construed to prohibit exit polling."). Critically, the Challenged Law neither defines the topics that may be addressed by an exit pollster nor requires that exit polling be conducted by members of the press. (App. at 24a.) Similarly, the Challenged Law does not limit the number of persons who may engage in exit polling at a particular polling place. Thus, under the Challenged Law itself, any number of persons may enter the No Approach Zone and poll exiting voters about any topic.

This means that a person (whether a member of the press, an average citizen, or even a political candidate) can ask an exiting voter his name, his

address, what candidate he just voted for, why he voted that way, his political party, religion, marital status, employment position, and his view on any number of politically and socially contentious subjects, among many other things. The pollster could even ask whether the exiting voter supports an amendment to the Fort Myers City Charter establishing a police oversight panel (the very same question that Petitioners are barred from asking under the Eleventh Circuit's opinion). And the person conducting the poll could ask the interviewee to sign a form attesting to the accuracy of the information just provided. None of this is prohibited by the Challenged Law.

Nor is exit polling by political candidates prohibited, so that candidates and their campaigns may approach exiting voters and engage in so-called push polling, in which the pollster asks a question in a way intended to influence or alter the view (and future vote) of the person questioned.[10] The Eleventh Circuit's opinion is simply wrong, then, in attempting to distinguish exit polling from exit petitioning on the grounds that "exit polling does not include *advocating* for the success of some political proposal or candidate." (App. at 12a n. 11 (emphasis added).)

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[10] *See, e.g., Caperton v. A.T. Massey Coal, Inc.*, 679 S.E.2d 223, 292 n.11 (W. Va. 2008) (Albright, J., dissenting) (a push poll is "a survey wherein limited and selective background information is conveyed to individuals, the purpose or result of which is to 'push' the individual being surveyed to a negative inference or response against a public individual"), *rev'd on other grounds*, 129 S. Ct. 2252 (2009).

Because there is no constitutionally meaningful difference between the exit polling permitted and the exit petitioning prohibited by the Challenged Law, the Eleventh Circuit's opinion is contrary to well-settled law. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."); *Carey v. Brown*, 447 U.S. 455, 466 (1980) (rejecting the proposition that labor picketing is more deserving of First Amendment protection than other types of protests).

The opinion also improperly re-defines the compelling state interest endorsed by *Burson*. Although the Eleventh Circuit's opinion identified Florida's interest as the same interest enunciated in *Burson* – "(1) protecting voters from confusion and undue influence; and (2) preserving the integrity of the election process" – it is actually grounded not in these interests but in preventing "commotion – that is, bustle, stir, confusion – around the polling place" (App. at 2a) and keeping voters from having to "run the gauntlet" (App. at 14a). The State's interest in shielding voters from mere interaction with other citizens is not a compelling state interest. *See Anderson v. Spear*, 356 F.3d 651, 661 (6th Cir. 2004) (protecting voters from being spoken to "is a far cry from prevention of corruption and intimidation – the only justification the Supreme Court recognized in *Burson* to meet the requirements of exacting scrutiny").

Indeed,

> [i]f the right to be let alone provides insufficient basis for the states to restrict the display of profanity in the courtroom or Nazis marching down residential streets occupied by objecting holocaust survivors, then the State's interest in assuring that voters are not subjected to any unwanted campaign speech alone cannot be a sufficient basis to regulate that clearly protected speech.

Id. at 661. *See also U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (under the First Amendment, the right of free expression prevails over a law designed to "shield the sensibilities of listeners"); *Fla. Comm.*, 682 F. Supp. at 1542 ("[I]f the quality of the state interest is merely the offense suffered by a voter who approaches the polls only to be approached by a petitioner, this brief exposure to grassroots democratic process, however unpalatable to some individuals, cannot justify a restriction on speech when the offensive activity can be avoided readily by communicating a declination of interest to the petitioner.") (citing *Cohen v. California*, 403 U.S. 15, 21-22 (1971)). The apparent desire of the Eleventh Circuit to keep everyone other than voters from approaching polling places is also contrary to *Burson* itself, which explains that "allowing members of the general public access to the polling place makes it more difficult for political machines to buy off all

the monitors." 504 U.S. at 207.[11] Thus, paradoxically, under the guise of protecting the democratic process, the Challenged Law and the Eleventh Circuit's opinion seek to protect the Florida public from democracy itself.

By granting the writ, this Court can correct the erroneous standard adopted by the Eleventh Circuit, and ensure that arbitrary categories of speech are not favored under the First Amendment based merely on the labels that are attached to them.

CONCLUSION

This case epitomizes the contradictory approaches courts have taken in applying *Burson* to speech by non-candidates near polling places. By granting the writ, this Court can provide guidance to the lower courts on the proper balance between competing constitutional rights at the heart of our democratic system.

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[11] Moreover, the desire to keep people away from polling places is not achieved by the Challenged Law, which bans from the polling area only a limited class of people, such as petition circulators, but permits anyone to be within the No Approach Zone so long as they do not "solicit" voters.

Respectfully submitted,

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APPENDIX

[PUBLISH]

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUNE 25, 2009
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No.08-15115-DD

D. C. Docket No. 08-00635-CV-FTM-29SPC

CITIZENS FOR POLICE ACCOUNTABILITY POLITICAL COMMITTEE, FLORIDA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Plaintiffs-Appellees,

versus

KURT S. BROWNING, in his capacity as Secretary of State of the State of Florida, SHARON L. HARRINGTON, in her official capacity as Supervisor of Elections, Lee County,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Florida

(June 25, 2009)

Before DUBINA, Chief Judge, EDMONDSON and HILL, Circuit Judges.

PER CURIAM:

This appeal is about voting. Florida Statute § 102.031(4) says that no person may solicit voters "within 100 feet of the entrance to any polling place ... or early voting site," and broadly defines "solicit" to include, among other things, "seeking or attempting to seek a signature on any petition[.]" Fla. Stat. §§ 102.031(4)(a)–(b).[1] The Florida statute codifies the Florida legislature's view that the right of Florida's citizens to vote warrants substantial protection from commotion -- that is, bustle, stir, confusion -- around the voting place. Today, we must decide whether the Florida legislature went too far in defending the right

[1] The Florida statute defines "solicit" and "solicitation" to "include, but not be limited to, seeking or attempting to seek any vote, fact, opinion, or contribution; distributing or attempting to distribute any political or campaign material, leaflet, or handout; conducting a poll except as specified in this paragraph; seeking or attempting to seek a signature on any petition; and selling or attempting to sell any item. The terms 'solicit' or 'solicitation' shall not be construed to prohibit exit polling." Fla. Stat. § 102.031(4)(b).

to vote by banning solicitation that targets voters exiting polling places[2] and that also concerns matters unrelated to any issue then on the ballot. We conclude that the Florida legislature did not go beyond its lawful power and, thus, reverse the district court's decision to bar enforcement of the Florida Statute.

Background

Plaintiff Citizens for Police Accountability Political Committee is a political action committee in the State of Florida. Plaintiff Florida State Conference of the NAACP is the parent organization of 60 Florida branches of the national NAACP. Plaintiffs support an amendment to the Fort Myers, Florida, city charter that would create a citizen oversight panel for the city police department. To place the charter amendment on a ballot, though, Plaintiffs must gather signatures from "10 percent of the [city's] registered electors as of the last preceding municipal general election." Fla. Stat. § 166.031(1). Plaintiffs claim that the best way to obtain signatures is to approach voters exiting polling places.

In January 2008, Plaintiff Citizens for Police Accountability Political Committee tried to solicit signatures from voters leaving a polling place in Fort Myers.[3] Although the proposed charter amendment

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[2] When we refer to polling places in this opinion, we also mean early voting sites.

[3] Plaintiff Florida State Conference of the NAACP did not join the petition-circulation effort until April 2008.

related to nothing then on the ballot, election officials, in accordance with the Florida statute, banned the signature-gatherers from soliciting voters within 100 feet of the polling place. Plaintiffs say that many voters were able to park, vote, and leave without interacting with the signature-gatherers.

Then in August 2008, Plaintiffs filed suit and sought injunctive relief under 42 U.S.C. § 1983 against Kurt S. Browning, in his capacity as Secretary of State of the State of Florida, and Sharon L. Harrington, in her capacity as Supervisor of Elections in Lee County, Florida (collectively, the State). Plaintiffs claimed that the Florida statute violated their First Amendment right to engage in political speech at polling places. Plaintiffs asked the district court to declare the Florida statute unconstitutional on its face and as it applied to their exit-solicitation efforts. Plaintiffs also sought to enjoin the State from enforcing the Florida statute against them when they solicited voters leaving polling places on election day later in August. As with the January election, the proposed charter amendment related to nothing on the ballot in the August election.

The district court held oral argument just before the August election. The next day, the district court entered a preliminary injunction enjoining the State from enforcing the Florida statute against Plaintiffs at polling places on election day.[4] The

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[4] The district court refused to issue an injunction on the ground that the Florida statute is facially unconstitutional. The district court, instead, granted the injunction on an "as applied" basis:

(continued ...)

district court concluded that the Florida statute was probably unconstitutional as it applied to Plaintiffs' exit-solicitation efforts because the State had produced little evidence that the exit-solicitation ban was necessary to serve a compelling interest or that it was sufficiently drawn to achieve that end. The State appeals.[5]

(... continued)
the State -- even extremely close to the polls -- could not enforce or threaten to enforce the Florida statute "as to Plaintiffs' peaceful, orderly and non-disruptive (1) solicitation of signatures (2) for their petition to place an amendment of the Fort Myers City Charter on a future ballot (3) from voters at polling places and early voting sites (4) after the voters have voted (5) during the August 26, 2008 election and its early voting period."

[5] In late 2008, the district court concluded that it had no case or controversy before it and, thus, dismissed the case after Plaintiffs alleged that they acquired the requisite number of signatures to place the proposed charter amendment on a ballot. No party has argued, however, that this appeal is moot or that we otherwise lack jurisdiction. We have considered the matter of our jurisdiction independently, and we conclude that this appeal remains worthy of our attention because the election-related issue involving the State and, at least, Plaintiff Florida State Conference of the NAACP -- the issue of the right to engage in peaceful exit solicitation about non-ballot issues near polling places -- is "capable of repetition, yet evading review." *Sierra Club v. Martin*, 110 F.3d 1551, 1554 (11th Cir. 1997) (preliminary injunction expired but appeal not moot where seasonal nature of bird nesting made it likely that forest service would face another injunction and where duration of injunction was too short to allow for appellate review before injunction expired); *see also Fed. Election Comm'n v. Wis. Right To Life, Inc.*, 127 S. Ct. 2652, 2663 (2007) ("We have recognized that the 'capable of repetition, yet evading review' doctrine, in the context of election cases, is appropriate when there are 'as applied' challenges as well as in the more typical case involving
(continued ...)

Standard of Review

We review a preliminary injunction for an abuse of discretion. *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1096 (11th Cir. 2004). A district court abuses its discretion if it applies an incorrect legal standard, applies the law in an unreasonable or incorrect manner, follows improper procedures in making a determination, or makes findings of fact that are clearly erroneous. *Id.* We review *de novo* questions of law. *United States v. Endotec, Inc.*, 563 F.3d 1187, 1194 (11th Cir. 2009).

Discussion

A preliminary injunction is an "extraordinary and drastic remedy." *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998) (quoting *All Care Nursing Serv., Inc. v. Bethesda Mem'l Hosp., Inc.*, 887 F.2d 1535, 1537 (11th Cir. 1989)). To secure an injunction, a party must prove four elements: (1) a

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(... continued)
only facial attacks. Requiring repetition of every 'legally relevant' characteristic of an as-applied challenge-down to the last detail-would effectively overrule this statement by making this exception unavailable for virtually all as-applied challenges.") (internal quotation marks and citation omitted); *Storer v. Brown*, 94 S. Ct. 1274, 1282 n.8 (1974) (although pertinent election was "long over," appeal concerning election-related statute not moot because "construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held").

substantial likelihood of success on the merits; (2) irreparable injury absent an injunction; (3) the injury outweighs whatever damage an injunction may cause the opposing party; and (4) an injunction is not adverse to the public interest. *Id.*

The State challenges on appeal only the district court's conclusion that Plaintiffs established a substantial likelihood of success on the merits of their claim that the Florida statute is unconstitutional as it applies to exit-solicitation efforts. The State admits that the Florida statute infringes some on Plaintiffs' right to engage in political speech[6] (see *Meyer v. Grant*, 108 S. Ct. 1886, 1892 (1988)) but contends that the restriction is necessary and narrowly tailored to protect the, at least, equally critical right to vote free from intimidation, interference, and fraud.

In *Burson v. Freeman*, 112 S. Ct. 1846 (1992), the Supreme Court addressed the facial constitutionality of a Tennessee statute that proscribed campaign activity within 100 feet of a polling place.[7] *Id.* at 1848. Considering the Tennessee

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[6] Plaintiffs contend that the Florida statute also infringes some on their First Amendment right to engage in political association. But even if true, the additional infringement has no material affect on the analysis otherwise applicable here; so we discuss it no further.

[7] The Tennessee statute banned within 100 feet of a polling place "the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question[.]" *Burson*, 112 S. Ct. at 1848. Like the Florida statute, which saves exit polling from its grasp, Fla. Stat. § (continued ...)

statute as a content-based restriction on political speech in a public forum, the statute could survive only if it was "necessary to serve a compelling state interest" and was "narrowly drawn to achieve that end." *Id.* at 1851 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 103 S. Ct. 948, 955 (1983)).

The Supreme Court upheld the Tennessee statute.[8] In doing so, a plurality of the Supreme Court[9] first reviewed whether Tennessee had a compelling interest to support its statute. Tennessee

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(... continued)
102.031(4)(b), the Tennessee statute also did not restrict exit polling. *Burson*, 112 S. Ct. at 1855. We express no view on the constitutionality of a statute that bans exit polling around polling places.

[8] Justice Blackmun authored the plurality opinion, which Chief Justice Rehnquist and Justices White and Kennedy joined. Justice Kennedy also filed a concurring opinion, and Justice Scalia filed an opinion concurring in the judgment. Justice Stevens filed a dissenting opinion, which Justices O'Connor and Souter joined. Justice Thomas did not participate in the decision.

[9] Justice Scalia joined in the judgment, but not in the plurality opinion. Justice Scalia reviewed the Tennessee statute under a less exacting standard than the strict scrutiny applied by the other Justices because he believed that the statute did not restrict speech in a "traditional public forum." *Id.* at 1859–61 (Scalia, J., concurring in judgment). His justification, therefore, seems to be broader than the plurality opinion. So, we look to the plurality opinion for guidance. *Marks v. United States*, 97 S. Ct. 990, 994 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.") (internal quotation marks omitted).

offered two: (1) protecting voters from confusion and undue influence; and (2) preserving the integrity of the election process. *Id.* at 1851–52. The plurality agreed that those interests were sufficiently compelling to warrant protection. *Id.*

The plurality then turned to whether the Tennessee statute was necessary to serve those compelling interests. In typical cases involving strict-scrutiny review, the Supreme Court would look to the state to offer evidence that the pertinent statute is necessary to promote the compelling interest. *See Eu v. San Francisco County Democratic Cent. Comm.*, 109 S. Ct. 1013, 1021–23 (1989). But in *Burson*, the plurality required Tennessee to produce no evidence of necessity. *Burson*, 112 S. Ct. at 1856. Instead, the plurality relied on the long history of regulation to combat election misconduct, the substantial consensus in favor of a secret ballot secured by a campaign-free zone that emerged from that history, and common sense to conclude "that *some* restricted zone around the voting area" was necessary to secure Tennessee's compelling interests. *Id.* (emphasis in original).

The plurality last examined whether the Tennessee statute was narrowly tailored. To pass this test, a state normally must show that the pertinent statute used the least restrictive means available to serve the compelling interest. *See Boos v. Barry*, 108 S. Ct. 1157, 1168 (1988). The plurality recognized, however, that it faced a unique situation because of the importance of protecting the right to vote and the difficulties in and dangers of requiring Tennessee to demonstrate the effects of its statute on political

stability.[10] *Burson*, 112 S. Ct. at 10 1856–57. So the plurality departed from the customary analysis and applied a modified "burden of proof" under which the Tennessee statute was sufficiently tailored if it was "reasonable" and did not "*significantly impinge* on constitutionally protected rights." *Id.* at 1857 (emphasis in original). The plurality concluded that the minor geographic limitation in the Tennessee statute -- 100 feet -- satisfied this more lenient standard. *Id.* The statute was constitutional.

The parties dispute the extent to which *Burson* affects this case. The State says that the Florida statute is no different than the Tennessee statute in *Burson* and, thus, the Florida statute should survive for the same reasons. Plaintiffs, on the other hand, claim that the facts in *Burson* are materially different

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[10] The plurality explained those difficulties and dangers this way:

> Elections vary from year to year, and place to place. It is therefore difficult to make specific findings about the effects of a voting regulation. Moreover, the remedy for a tainted election is an imperfect one. Rerunning an election would have a negative impact on voter turnout. Thus, requiring proof that a 100-foot boundary is perfectly tailored to deal with voter intimidation and election fraud would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action.

Burson, 112 S. Ct. at 1856–57 (internal quotation marks and footnote omitted).

because there a campaign worker wanted to solicit *votes* on election day, while here Plaintiffs aim only to seek the supporting signatures of voters -- who had already voted -- about a non-ballot issue.

We accept that *Burson* does not bind us here; the material facts are different in some ways. Nevertheless, we believe that the *Burson* plurality opinion is highly persuasive; and we extend its reasoning to the facts of this case.

1. Compelling Interest

Under the *Burson* plurality's standard, we must first examine whether the State has a compelling interest to support its statute. The State contends that it shares the same compelling interests as Tennessee in *Burson*: (1) protecting voters from confusion and undue influence; and (2) preserving the integrity of the election process. Plaintiffs take no issue with the presence or legitimacy of those compelling interests in this case. Nor do we.

2. Necessity

Having identified the pertinent compelling interests, we turn to the more difficult question of whether the Florida statute is necessary to serve those interests. The State claims that it need not produce evidence of exit solicitors intimidating voters or interfering with the election process to prove necessity. Instead, the State asserts that it, like Tennessee in *Burson*, may rely on our country's long history of election regulation, the widespread agreement that emerged from that history, and common sense to show that the ban on exit

solicitation within 100 feet of a polling place is necessary to promote its compelling interests.

Plaintiffs criticize this approach. They say that exit solicitation is a peaceful, non-disruptive activity targeting only those voters who have already voted[11] and claim that this "already-voted" feature distinguishes their conduct from the more intimidating, violent, and unsavory behavior talked about in the *Burson* plurality opinion.[12] Plaintiffs, therefore, argue that the State may not rely on the

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[11] Plaintiffs compare exit solicitation to exit polling. Plaintiffs contend that the Florida statute cannot lawfully prohibit one and permit the other because, according to Plaintiffs, the activities are constitutionally indistinguishable. But we disagree: exit polling does not include advocating for the success of some political proposal or candidate. Like other courts before us, we see fundamental differences between the two activities and, therefore, reject the comparison. *See, e.g., Schirmer v. Edwards*, 2 F.3d 117, 122 (5th Cir. 1993) (exit polling cases not applicable to solicitation cases); *Am. Broad. Co. v. Blackwell*, 479 F. Supp. 2d 719, 738 (S.D. Ohio 2006) ("[E]xit polling cannot reasonably be construed as a form of electioneering under any definition of that term."). Moreover, the plurality in *Burson* expressly said that the Tennessee statute did not need to prohibit exit polling to survive strict-scrutiny review. *Burson*, 112 S. Ct. at 1855.

[12] Plaintiffs claim that the plurality in *Burson* found no history of electoral abuse by and no history of election-reform efforts directed at exit solicitors. They cite as support the following language in the plurality opinion: "[T]here is simply no evidence that political candidates have used other forms of solicitation or exit polling to commit such electoral abuses." *Id.* at 1856. But we believe that the plurality is referring in this dictum to "charitable and commercial solicitation" and not, as Plaintiffs suggest, to forms of political canvassing like exit solicitation. So we afford this argument little weight.

historical evidence of election abuse discussed in the *Burson* plurality opinion but must instead offer its own proof that the ban on exit solicitation in the Florida statute is necessary. Echoing the district court, Plaintiffs say that the State has produced no such evidence.

About history, we agree with the State. We simply cannot accept that exit solicitation is so different from the other political conduct highlighted in *Burson* to compel a different result here. As we see it, commotion tied to exit solicitation is as capable of intimidating and confusing the electorate and impeding the voting process -- even deterring potential voters from coming to the polls -- as other kinds of political canvassing or political action around the polls. This observation seems especially true given the reality that polling places are of such a diverse size and shape, including sometimes using the same doors to enter and exit the polling place, that voters waiting to cast their ballot will often be close to and indistinguishable from voters who have already done so.[13] Although Plaintiffs suggest that election officials can police the polls to ensure that exit solicitation remains peaceful and targets only voters who have already voted, we believe this proposal places too great a burden on those officials to

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[13] Plaintiffs even acknowledged in their complaint when they described the method by which they intended to engage in exit solicitation *the difficulty in targeting only those voters who have already voted*: "A petition circulator will stand near the exit to the polling place, in a position to maximize the *likelihood* of interacting with voters who have already cast their ballots . . . ." (emphasis added).

make split-second decisions on who is being solicited, on how they are being solicited, and about what they are being solicited: an invitation to controversy and more disturbances then and there.

But even in Plaintiffs' imagined perfect world when absolutely only those people who have voted are solicited, our belief does not waiver. The State wants peace and order around its polling places, and we accord significant value to that desire for it preserves the integrity and dignity of the voting process and encourages people to come and to vote. *See Buckley v. Am. Constitutional Law Found., Inc.*, 119 S. Ct. 636, 640 (1999) (acknowledging that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes") (quoting *Storer*, 94 S. Ct. at 1279); *Clean Up '84 v. Heinrich*, 759 F.2d 1511, 1514 (11th Cir. 1985) ("We recognize that the state has a significant interest in protecting the orderly functioning of the election process. It must ensure its voters that they may exercise their franchise without distraction, interruption, or harassment."). Given the example of history, if exit solicitation must be allowed close to the polls, it takes little foresight to envision polling places awash with exit solicitors, some competing (albeit peacefully) for the attention of the same voters at the same time to discuss different issues or different sides of the same issue. And we accept it as probable that some -- maybe many -- voters faced with *running the gauntlet* will refrain from

participating in the election process merely to avoid the resulting commotion when leaving the polls.[14]

The *Burson* plurality opinion teaches us that the State need not wait for actual interference or violence or intimidation to erupt near a polling place for the State to act.[15] The State may take precautions to protect and to facilitate voting; and the pertinent history is broad enough to provide the proof of reasonableness for a zone of order around the polls.

It is hard for State election officials to know the precise moment just before solicitation becomes interference in the election process. And if an election is disturbed, it is hard to know what the impact was on the election. The cost of a disturbed election is too high to allow the State only to react to disturbances

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[14] Indeed, although not necessary to our conclusion, the State produced evidence confirming that many Florida voters have complained that their entrance to and exit from the polls is like "running the gauntlet" and have indicated that "they will no longer participate in elections unless their access to the polls is better protected by the law."

[15] In *Burson*, the plurality observed that Tennessee had other statutes that made it a crime "to interfere with an election or to use violence or intimidation to prevent voting." *Burson*, 112 S. Ct. at 1855. But the plurality recognized that Tennessee's power to protect the voting process was broader than just prohibiting actual interference, violence, or intimidation. *Id.* In a similar way, the district court injunction limits the State to prohibiting only conduct that is disorderly, disruptive, or not peaceful; but to ease and to protect voting, the State's legitimate power under the Federal Constitution goes beyond what the injunction would allow the State to do. The State can do more to restrict political canvassing in a small zone around the polls. Thus, the injunction cannot stand.

but not to prevent disturbances. We, therefore, reject the contention that the State must offer its own evidence demonstrating that the ban on exit solicitation is necessary to serve its compelling interests; our country's long history of election regulation, the consensus emerging from that history, and the practical need to keep voters and voting undisturbed all prove that the ban is warranted.[16]

3. Narrowly Tailored

We last explore the breadth of the Florida statute. To prove that the Florida statute is narrowly tailored, the State must show that the Florida Statute is "reasonable and does not *significantly impinge* on constitutionally protected rights."[17] *Burson*, 112 S. Ct. at 1857 (quoting *Munro v. Socialist Workers Party*, 107 S. Ct. 533, 537–38 (1986))

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[16] Many other state legislatures seemingly share the belief that some solicitation-free zone around polling places is necessary to protect voters from confusion and undue influence and to preserve the integrity and dignity of the election process, as other states too have enacted law markedly similar to the Florida statute. *See, e.g.*, Cal. Elec. Code § 18370 (100-foot zone); Colo. Rev. Stat. § 1-13-714 (100-foot zone); Ga. Code Ann. § 21-2-414(b) (150-foot zone); Idaho Code Ann. § 18-2318(1) (100-foot zone); Mass. Gen. Laws ch. 54, § 65 (150-foot zone); Mich. Comp. Laws § 168.744(2) (100-foot zone); Neb. Rev. Stat. § 32-1524(2) (200-foot zone); Utah Code Ann. § 20A-3-501(2)(a) (150-foot zone).

[17] The plurality in *Burson* cautioned that the modified "burden of proof" applies only where the prohibited activity threatens to interfere with the act of voting itself or physically interferes with voters attempting to cast their ballot. *Burson*, 112 S. Ct. at 1856 n.11. We believe that exit solicitation of the kind in this case triggers the application of the *Burson* plurality's standard.

(emphasis added in *Burson*). The Florida statute mirrors in many respects -- including the size of the restricted zone -- the Tennessee statute upheld in *Burson*. And we conclude that the Florida statute is sufficiently tailored to satisfy the pertinent standard.

Conclusion

We accept that the right to engage in political discourse is "the essence of self-government." *Garrison v. Louisiana*, 85 S. Ct. 209, 216 (1964). But voting is about the most important thing there is. And as history has taught us, the right of political discourse is far from absolute: it must at times step aside so other freedoms similarly pivotal to our republic can thrive. The Florida statute, which balances the right to engage in political speech against the right to vote without interference and harassment, represents one of those times.

We stress the short time (a few days a year) and small area (less than a football field) in which the Florida statute suppresses some political speech around the polls; Plaintiffs are free to solicit signatures unencumbered most days a year and to solicit signatures outside the solicitation-free zone all days a year. And by the way, we are not alone in our decision: other courts, in cases involving petitions, have also upheld statutes establishing solicitation-free zones around polling places.[18] We believe that

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[18] For example, in *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738 (6th Cir. 2004), the Sixth Circuit Court of Appeals applied the *Burson* plurality's standard and affirmed the dismissal of a challenge to an Ohio statute that

(continued ...)

the sanctity of the voting process and the abuse it has historically faced must allow the Florida legislature to exercise some foresight, to take precautions, and to prohibit questionable conduct near polling places before that conduct proves its danger; a compromised election is too great a harm to require otherwise.

We, therefore, conclude today that the Florida statute does not violate the First Amendment by banning Plaintiffs from engaging in exit solicitation about a non-ballot issue within 100 feet of polling places in Florida. Accordingly, the district court abused its discretion in granting Plaintiffs a preliminary injunction.

REVERSED.

(... continued)
prohibited solicitation within 100 feet of a polling place. *Id.* at 748. And earlier, in *Schirmer*, the Fifth Circuit Court of Appeals, also relying on the *Burson* plurality's standard, upheld a Louisiana statute that prohibited solicitation about non-ballot issues within 600 feet of a polling place. *Schirmer*, 2 F.3d at 119.

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U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

CITIZENS FOR POLICE ACCOUNTABILITY POLITICAL COMMITTEE, and FLORIDA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR ADVANCEMENT OF COLORED PEOPLE,

Plaintiffs,

vs. Case No. 2:08-cv-635-FtM-29SPC

KURT S. BROWNING, in his capacity as Secretary of State of the State of Florida, and SHARON L. HARRINGTON, in her official capacity as Supervisor of Elections, Lee County,

Defendants.

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OPINION AND ORDER

This matter comes before the Court on

Plaintiffs' Motion for Preliminary Injunction (Doc. #2) filed on August 11, 2008. Plaintiffs seek to enjoin the enforcement of Florida Statute § 102.031 (4) (a)-(b) (2008) on the basis that it is facially unconstitutional and unconstitutional as applied to plaintiffs' petition circulation activities. Defendant Browning's Response in Opposition to Plaintiffs' Motion for Preliminary Injunction (Doc. #11) was filed on August 19, 2008. The Court heard oral arguments on August 21, 2008. For the reasons set forth below, the motion will be granted in part.

I.

Plaintiff Citizens for Police Accountability Political Committee ("CPA") is a political action committee registered with the Florida Secretary of State and the Lee County Supervisor of Elections. (Doc. #1, ¶10.) Plaintiff Florida State Conference of the National Association for the Advancement of Colored People ("Florida NAACP") is the umbrella organization for sixty Florida branches of the national NAACP and coordinates the activities of the NAACP branches throughout Florida, including the activities of the Lee County, Florida, branch. (*Id.* at ¶ 11.) Since August 30, 2007, CPA has been circulating a petition to place an amendment of the City of Fort Myers Charter on the ballot, in order to create a citizen oversight panel for the Fort Myers Police Department (the "Petition"). (*Id.* at ¶¶ 1, 15.) The Florida NAACP joined the Petition circulation effort on April 23, 2008. (*Id.* at ¶ 18.) To be placed on the ballot, petitions must be "signed by ten percent of the registered electors as of the last preceding municipal general election." FLA. STAT. § 166.031 (1) (2007).

Plaintiffs assert that after nearly a year of circulating the Petition at polling places, recreational areas, and churches, as well as canvassing door-to-door, they and others have obtained approximately 1,700 signatures of verified voters out of the required 2,508 signatures. (Doc. #1, ¶¶ 16, 19-22.)

Plaintiffs assert that the best method of obtaining qualified signatures is to seek voters' signatures after they have left a polling place or, early voting site. (*Id.* at ¶ 23.) During the Presidential Preference Primary on January 29, 2008, however, CPA petition circulators working one Lee County precinct were required to stand outside a 100-foot "No Approach Zone" created by the Florida statute now being challenged. (*Id.* at ¶ 16.) Plaintiffs assert that this "No Approach Zone," which in some precincts covers not only the polling place but also portions of the parking area, entry path and public sidewalks, severely impedes their First Amendment right of access to the high concentration of civically active, registered voters found at polling places on election days and at early voting sites. (*Id.* at ¶¶ 17, 24.)

Plaintiffs plan to circulate the Petition at polling places in Lee County on August 26, 2008, and at early voting sites prior to that date, in an attempt to obtain enough signatures to place their proposed amendment on an upcoming ballot. (*Id.* at ¶ 26.) Plaintiffs seek to have a petition circulator stand near the exit of certain polling places, approach voters as they exit, and attempt to obtain their signature on the Petition. (*Id.* at ¶ 27.) Although the subject matter of the Petition does not relate to any matter

on the current ballot, the "No Approach Zone" mandated by the Florida statute would preclude this activity. (*Id.* at ¶ 28.)

Count One of the Complaint seeks a declaratory judgment that the Florida statute is facially unconstitutional as a content-based, substantially overbroad restriction on protected First Amendment speech and conduct. (*Id.* at ¶¶ 39, 40.) Count Two seeks a declaratory judgment that the Florida statute is unconstitutional as applied to plaintiffs' Petition circulation activities as a content-based, impermissible restriction on plaintiffs' First Amendment rights of speech and association, and the right to petition for grievances. (*Id.* at ¶¶ 47, 50, 52.) Count Three seeks preliminary and permanent injunctive relief banning the enforcement of the Florida statute against plaintiffs. (*Id.* at ¶ 58.)

II.

Florida statute § 102.031 addresses, among other things, the maintenance of good order at polling places and the unlawful solicitation of voters. The statute first gives each election board the "full authority to maintain order at the polls and enforce obedience to its lawful commands during an election and the canvass of the votes." FLA. STAT. § 102.031 (1) (2008). The statute then requires the Sheriff to deputize a deputy sheriff for each polling place and each early voting site, requires the deputy sheriff to be present from the time the polls or early voting sites open until the election is completed, and requires the deputy sheriff to be subject to the lawful commands of the clerk or inspectors and to maintain good order. FLA. STAT. § 102.031 (2). The statute

identifies the persons who may enter the polling room or polling place and early voting areas. FLA. STAT. § 102.031 (3). The statute then provides, in the portion challenged by plaintiffs, as follows:

> (a) No person, political committee, committee of continuous existence, or other group or organization may solicit voters inside the polling place or within 100 feet of the entrance to any polling place, or polling room where the polling place is also a polling room, or early voting site. Before the opening of the polling place or early voting site, the clerk or supervisor shall designate the no-solicitation zone and mark the boundaries.
>
> (b) For the purpose of this subsection, the terms "solicit" or "solicitation" shall include, but not be limited to, seeking or attempting to seek any vote, fact, opinion, or contribution; distributing or attempting to distribute any political or campaign material, leaflet, or handout; conducting a poll except as specified in this paragraph; seeking or attempting to seek a signature on any petition; and selling or attempting to sell any item. The terms "solicit" or "solicitation" shall not be construed to prohibit exit polling.

FLA. STAT. § 102.031(4) (a)-(b). The statute does not define "exit polling." The statute further requires that each supervisor of elections inform the clerk of the designated area within which soliciting is deemed to

be unlawful, based on the particular characteristics of that polling place. FLA. STAT. § 102.031 (4) (c). The supervisor or clerk is allowed to "take any reasonable action necessary to ensure order at the polling places," including having disruptive or unruly persons removed by law enforcement from the polling room, polling place, or from the 100-foot zone surrounding the polling place. *Id.*

The Florida Department of State is required to create and adopt a uniform polling place procedures manual discussing, among other things, regulations governing solicitation by individuals and groups at polling places. FLA. STAT. § 102.014 (5) (a) (2008). Florida Administrative Code Rule 1S-2.034 adopted the "Polling Place Procedures Manual" (the "Manual") by the Florida Department of State, Division of Elections, the current version of which is effective August, 2008. In pertinent part, the Manual states that "[t]he ***only exception*** to the no-solicitation law applies to the media or others who are allowed to conduct exit-polling activities. They may approach voters only *after* voters leave the polling place." *See* Div. of Elections, Fla. Dep't of State, *Polling Place Procedures Manual*, at 4 (2008) (emphasis in original), http://election.dos.state.fl.us/publications/pdf/2007-2008/2008VoterRegisVoteGuide.pdf.

III.

In the Eleventh Circuit, the issuance of "a preliminary injunction is an extraordinary and drastic remedy that should not be granted unless the movant clearly carries its burden of persuasion" on each of four prerequisites. *Canal Auth. of Fla. v.*

Callaway, 489 F.2d 567, 573 (5th Cir. 1974)[1]. *See also McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998). The party seeking a preliminary injunction must demonstrate: (1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered absent an injunction; (3) that the injury to movant outweighs the injury the proposed injunction would cause to the opposing party; and (4) that the proposed injunction would serve the public interest. *E.g.*, *Johnston v. Tampa Sports Auth.*, 530 F.3d 1320, 1325 (11th Cir. 2008). The burden of persuasion for each of the four requirements is upon the movant. *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc).

IV.

Plaintiffs argue that FLA. STAT. § 102.031 (4) (a)-(b) is unconstitutional both on its face and as applied to plaintiffs' exit petitioning. The current statute was amended effective July 1, 2008, and no reported case has yet addressed its constitutionality. Plaintiffs argue that the recent amendments to the statute harken back to former versions of the statute which were found unconstitutional. (Doc. #2, pp. 2-7.) Defendants respond that *Burson v. Freeman*, 504 U.S. 191 (1992), compels the conclusion that the Florida statute is constitutional and that plaintiffs have not satisfied any of the four requirements for a

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[1] In *Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) the Eleventh Circuit adopted as binding precedent all the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

preliminary-injunction. (Doc. #11.)

Some preliminary matters are not disputed by either party. First, there is no doubt that soliciting signatures for a petition to amend a city charter is a matter protected by the First Amendment. Such conduct has been appropriately described as "core political speech" in which the importance of First Amendment protection is "at its zenith." *Meyer v. Grant*, 486 U.S. 414, 414, 420-22, 425. (1988); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 186-87 (1999). Additionally, gathering at the polls to solicit signatures is protected political association. *Clean-Up '84 v. Heinrich*, 759 F.2d 1511, 1511 (11th Cir. 1985).

Second, there is also no doubt that the State of Florida and Lee County have compelling interests in regulating election and voting matters. Each has compelling interests in protecting the right of their citizens to vote freely for candidates of their choice in an election conducted with integrity and reliability, and in protecting against voter intimidation, confusion, and election fraud. *Burson*, 504 U.S. at 198-99. Thus, the U.S. Supreme Court has recognized that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Buckley*, 525 U.S. at 187 (citations omitted.) *See also Clean-Up '84*, 759 F.2d at 1514 ("We recognize that the state has a significant interest in protecting the orderly functioning of the election process. It must ensure its voters that they may exercise their franchise without distraction, interruption, or harassment.") Additionally, the

Florida Voter's Bill of Rights includes the right to "[v]ote free from coercion or intimidation by elections officers or any other person." FLA. STAT. § 101.031 (2) (2006).

Third, since at least 1977, Florida has attempted to specifically prohibit solicitations of signatures for petitions near polling places. FLA. STAT. § 104.36 (1977). Florida's statutory history, in addressing the concerns related to solicitation at a polling place, has been summarized in Florida Committee for Liability Reform v. McMillan, 682 F. Supp. 1536, 1538-39 (M.D. Fla. 1988) and CBS, Inc. v. Smith, 681 F. Supp. 794, 797-98 (S.D. Fla. 1988). Each version of the statute that has been challenged has been found to be unconstitutional or has been enjoined as likely to be unconstitutional. Clean-Up '84, 759 F.2d at 1513 (invalidating 1984 version as overbroad on its face); Florida Committee, 682 F. Supp. 1536, 1538-39 (M.D. Fla. 1988) (enjoining enforcement of 1987 version as overbroad); CBS, Inc., 681 F. Supp. at 794 (enjoining enforcement of 1987 version as applied to media exit polling); Firestone v. News-Press Pub. Co., 538 So. 2d 457, (Fla. 1989) (invalidating statute, precluding nonvoters from being within fifty feet of the polling place, as overbroad); CBS Broad., Inc. v. Cobb, 470 F. Supp. 2d 1365 (S.D. Fla. 2006) (enjoining enforcement of 2005 version as overbroad as applied to exit polling). Despite this history, defendants assert that "*Burson* reconstructed the way courts approach constitutional challenges to polling place restrictions." (Doc. #11, p. 4.)

V.

The most hotly-contested issue is plaintiffs' substantial likelihood of success on the merits. Plaintiffs assert that they are likely to prevail on both their facial and as-applied challenges, while defendants assert that plaintiffs will not prevail on either.

A. Facial Challenge to Statute:

In Count One of their Complaint, plaintiffs argue that Florida Statute § 102.031 (4) (a)-(b) (2008) violates the First Amendment on its face. A facial challenge seeks to invalidate the statute itself, and seeks to vindicate not only plaintiffs' rights but those of others who may be adversely impacted by the statute. *DA Mortg., Inc. v. City of Miami Beach*, 486 F.3d 1254, 1262 (11th Cir. 2007). The U.S. Supreme Court has articulated two standards for evaluating such facial First Amendment challenges. *Clean-Up '84*, 759 F.2d at 1513.

(1) Unconstitutional in All Applications:

Under the first test, "a plaintiff can only succeed in a facial challenge by establish[ing] that no set of circumstances exists under which the Act would be valid, i.e., that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 128. S. Ct. 1184, 1190 (2008) (quoting *United States v. Salerno*, 481 U.S. 739 (1987)). "[A] facial challenge must fail where the statute has a plainly legitimate sweep." *Wash. State Grange*, 128 S. Ct. at 1190, quoting *Washington v. Glucksberg*, 521 U.S. 702, 739-40. (1997). The Supreme Court also cautioned that "[i]n determining

whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange*, 128 S. Ct. at 1190 (citation omitted.) In short, "[f]acial challenges are disfavored ..." *Id.* at 1191.

Plaintiffs do not seem to pursue an argument under this standard. (Doc. #2, pp. 18-21.) It is clear in light of *Burson* and *Wash. State Grange* (discussed below) that Florida Statute § 102.031 (4) (a)-(b) (2008) is not categorically unconstitutional in each of its potential applications. Therefore, plaintiffs do not satisfy this standard.

(2) Overbreadth of statute:

The second type of facial challenge in the First Amendment context concerns an impermissibly overbroad statute. *Wash. State Grange*, 128 S. Ct. at 1191 n.6. "According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech." *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008). Because this doctrine balances competing interests, the Supreme Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial,* not only in an absolute sense, but also relative to the statute's plainly legitimate sweep. Invalidation for overbreadth is 'strong medicine' that is not to be 'casually employed.'" *Williams*, 128 S. Ct. at 1838 (citations omitted.) "'The concept of 'substantial overbreadth' is not readily reduced to an exact definition. . . . In short, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections

of parties not before the Court for it to be facially challenged on overbreadth grounds." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800-801 (1984).

The Court finds that plaintiffs have not shown a substantial likelihood that they can establish that Florida Statute § 102.031(4) (a)-(b) (2008) prohibits a substantial amount of protected speech either in an absolute sense or relative to the statute's plainly legitimate sweep. While plaintiffs show that a literal application of the 100-foot zone encompasses traditional public forums at some polling places, the showing has not been sufficient either in the absolute sense or relative to the statute's plainly legitimate scope. The statute requires that the supervisor of elections inform the clerk of the designated no-solicitation area "based on the particular characteristics of that polling place," FLA. STAT. § 102.031 (4) (c), and requires the clerk or supervisor to designate the no-solicitation zone and mark its boundaries before the polling place or early voting site is opened. FLA. STAT. § 102.031 (4) (a). Plaintiffs allege that one polling place, Precinct 48, had a No Approach Zone that actually encompassed traditional public forums (Doc. #1, ¶¶ 16-17) and that this appeared to be the situation at two other polling places as well. (Declaration of Aisha Sanchez, Doc. 2-3, ¶¶ 14-15.) This does not constitute a sufficient showing that the actually designated no-solicitation zones have included traditional public forums to a substantial degree.

B. As Applied Challenge:

An as-applied challenge is available even

where a facial challenge is rejected. *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2670 n.8 (2007); *City Council*, 466 U.S. at 803 n.22 ("The fact that the ordinance is capable of valid applications does not necessarily mean that it is valid as applied to these litigants.") An "as-applied" challenge seeks to vindicate only plaintiffs' own rights. *DA Mortg., Inc.*, 486 F.3d at 1262; *Jacobs v. The Florida Bar*, 50 F.3d 901, 906 (11th Cir. 1995).

The general substantive principles relating to election restrictions were summarized in *Wash. State Grange*: the States possess a broad power to prescribe the time, place and manner of holding elections for federal and state offices; this power is not absolute, and may not be exercised in a way that violates specific provisions of the U.S. Constitution, including the First Amendment; the States have the responsibility to observe the First Amendment rights of their citizens, including the freedom of political association; election regulations that impose a severe burden on associational rights are subject to strict scrutiny and are upheld only if they are narrowly tailored to serve a compelling state interest; however, if a State imposes only modest burdens, then a state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions on election procedures. *Wash. State Grange*, 128 S. Ct. at 1191-92 (quotations and citations omitted).

As relevant to this case, FLA. STAT. § 102.031(4) (a)-(b) provides that "[n]o person may solicit voters . . . within 100 feet of the entrance to any polling place . . . or early voting site.... "'[S]olicit'

or 'solicitation' shall include, but not be limited to, ... seeking or attempting to seek a signature on any petition; 'solicit' or 'solicitation' shall not be construed to prohibit exit polling." Defendants conceded at oral argument that the statute is content-based, and therefore that strict or exacting scrutiny applies. The strict scrutiny standard defendants advocate is that set forth in *Burson*.

At issue in *Burson* was a Tennessee statute prohibiting the solicitation of votes for or against any person, political party or position, and prohibiting displays or distributions of campaign materials within 100 feet of the entrance to a polling place. *Burson*, 504 U.S. at 193-4. A plurality of the Supreme Court found that "[a]s a facially content-based restriction on political speech in a public forum [the Tennessee statute] must be subjected to exacting scrutiny: The State must show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end" *Id.* at 198 (quotations omitted). The Supreme Court noted that to survive strict scrutiny, a State must do more than assert a compelling state interest – it must demonstrate that its law is necessary to serve the asserted interest." *Id.* at 199. The Court "readily acknowledged" that a law rarely survives the exacting standards of strict scrutiny analysis, but found that "an examination of the evolution of election reform . . . demonstrates the necessity of restricted areas in or around polling places." *Id.* at 200. The Court found that a history of pervasive and systematic abuses of the electoral system led all fifty states to settle on the same solution: "a secret ballot

secured in part by a restricted zone around the voting compartments. We find that this widespread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud." *Id.* at 206.

In reaching this conclusion, the Court rejected three arguments. First, the Court rejected the argument that the statute was overinclusive because the state could secure the same compelling interests with statutes making it a misdemeanor to interfere with an election or to use violence or intimidation to prevent voting. *Id.* (quotations omitted). Second, the Court rejected the argument that the statute was underinclusive because it does not restrict other types of speech, including exit polling. *Id.* at 207 (quotations omitted). The Court stated: "We agree that distinguishing among types of speech requires that the statute be subjected to strict scrutiny. We do not, however, agree that the failure to regulate all speech renders the statute fatally underinclusive." *Id.* The Court found that while there was ample historical evidence that political candidates had used campaign workers to commit voter intimidation and electoral fraud, there was no historical evidence that other forms of solicitation or exit polling had been used to commit such electoral abuses. "States adopt laws to address the problems that confront them. The First Amendment does not require states to regulate for problems that do not exist." *Id.* Third, the Court rejected the argument that there was no link between ballot secrecy and some restricted zone surround the voting area. *Id.* at 207-08. The Court held that "*some*

restricted zone around the voting area is necessary to secure the state's compelling interest." *Id.* at 208. (emphasis in original).

The Court then discussed the "real question" of "*how large* a restricted zone is permissible or sufficiently tailored." *Id.* (emphasis in original). The Court concluded that an empirical demonstration of the objective effects of the statute on voting was unnecessary ("Elections vary from year to year, and place to place"), and that proof that the 100-foot boundary was perfectly tailored to deal with the State's interests was not necessary so long as the statute was reasonable and did not significantly impinge on constitutionally protected rights. *Id.* at 209.[2] The Court concluded that it did "not think that the minor geographic limitation prescribed by [the statute] constitute [d] such a significant impingement. Thus, [it] simply d[id] not view the question whether the 100-foot boundary line could be somewhat tighter as a question of 'constitutional dimension.'" *Id.* at 210. "The State of Tennessee has decided that these last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible. We do not find that this is an unconstitutional choice." *Id.*

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[2] The Court noted that this "modified 'burden of proof'" applied "only when the First Amendment right threatens to interfere with the act of voting itself, *i.e.*, cases involving voter confusion from overcrowded ballots, like *Munroe [v. Socialist Workers Party*, 479 U.S. 189 (1986)], or cases such as this one, in which the challenged activity physically interferes with electors attempting to cast their ballots." *Burson*, 504 U.S. at 209 n. 11.

Thus, under *Burson*, the state must show that the statute is (1) necessary (2) to serve a compelling state interest and (3) that it is narrowly drawn or sufficiently tailored to achieve that end. As discussed previously, there is no dispute that Florida Statute § 102.031 (4) (a)-(b) (2008) serves compelling state interests. The difficulty in this case involves whether the restricted area is "necessary" and narrowly drawn in relation to plaintiffs' specific activities. In the as-applied context of this case, the Court finds that the statutory restriction is neither necessary nor narrowly drawn as applied to plaintiffs' exit petitioning activity.

Burson's determination that a restricted area around polling places could be necessary was based upon an extensive review of historical experience with political candidates, and their abuse and attempted abuse of the electoral process. The Tennessee statute at issue related directly to such abuse, prohibiting the solicitation of "votes" (not "voters" as in the Florida statute) and the display and distribution of campaign materials. The ample historical evidence clearly established the necessity for such a restricted zone as to such conduct. In contrast, *Burson* found no historical evidence that solicitations by others or exit polling had been used to commit comparable electoral abuses. 504 U.S. at 206. The evidence submitted by the parties in this case also fails to establish electoral abuses perpetrated by other exit solicitors or exit polling. Therefore, at this stage of the proceedings, there has not been a sufficient showing that the restriction on exit petitioning is necessary.

In this case, the narrowly-drawn component of strict scrutiny review relates not to the 100-foot distance but to the types of activities precluded within that zone. Exit polling, left undefined in the Florida statute, is permitted, while other exit solicitation, including the solicitation of signatures on petitions, are prohibited. Even assuming that an exit solicitation qualifies for the "modified burden of proof" requirement of *Burson* because it is considered an "activity [which] physically interferes with electors attempting to cast their ballots," *Burson*, 504 U.S. 209 n. 11, the statute must still be reasonable and must not significantly impinge on constitutionally protected rights. The record at this stage of the proceedings does not satisfy these requirements as they relate to plaintiffs' proposed activities. Plaintiffs propose to, in a peaceful, orderly and non-disruptive manner, (1) solicit signatures (2) for a petition required by statute to place an amendment of the Fort Myers City Charter on a future ballot (3) from voters at polling places and early voting sites (4) after the voters have voted (5) during the August 26, 2008 election and its early voting period, during which the subject matter of the petition is not related to any matter upon which the voters are deciding. Under these specific circumstances, the ban on soliciting signatures is not narrowly drawn or sufficiently tailored to satisfy the First Amendment.

VI.

The remaining three requirements for a preliminary injunction require relatively less discussion, and each will be briefly addressed in turn.

A. Substantial Threat of Irreparable Injury if Relief Denied:

Defendants assert that plaintiffs' purported injury can be simply quantified in terms of the additional money, time and effort to be expended by plaintiffs while pursuing the remaining signatures for the Petition. (Doc. #11, pp. 18-19.) Defendants claim that plaintiffs "could eliminate any purported harm by expending the additional increment of time and effort to collect sufficient signatures outside of the protected zone, just as numerous other sponsors of successful Florida initiative petitions (both local and statewide) have done."[3]

Plaintiffs assert that irreparable harm will result in the absence of an injunction; namely, that no amount of monetary damages would suffice to compensate plaintiffs for "the lost opportunity to circulate the [P]etition at Lee County polling places on the day of an election and at early voting sites," (Doc. #2, p. 22), and that "because of the 'intangible nature' of the harm the chilling of speech inflicts, it cannot be compensated for by money damages." (*Id.* (citing *KH Outdoor, LLC v. Trussville*, 458 F.3d 1261,

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[3] Defendants claim that *Elrod* is inapplicable because Florida's "No Approach Zone" "does not prevent speech altogether – it is a 'minor geographic limitation' that constitutes no 'significant impingement' of First Amendment rights." (Doc. #11, p. 19 n.15 (quoting *Burson*, 504 U.S. at 210).) The language that defendants reference, however, refers to the Supreme Court's discussion of the radius of the *Burson* statute's protected zone (whether a 100-foot zone is narrowly tailored), rather than the Supreme Court's substantive discussion as to the protected zone's constitutionality overall.

1272 (11th Cir. 2006).)

The Court finds that plaintiffs have shown that they will suffer irreparable injury if a preliminary injunction is denied because the loss of First Amendment rights, even for a short period, causes irreparable harm. "[I]t is well established [by the Supreme Court] that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *E.g.*, *KH Outdoor*, 458 F.3d at 1271-2 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983). "To the extent that an infringement of First Amendment rights is shown, some federal courts have held that irreparable injury justifying preliminary injunctive relief is presumed." *Cate*, 707 F.2d at 1189 n. 10 (citation omitted). "One reason for such stringent protection of First Amendment rights certainly is the intangible nature of the benefits flowing from the exercise of those rights; and the fear that, if these rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future." *Id.* at 1189 (citation omitted). Restricting plaintiffs' access to seek petition signatures will work an irreparable harm on plaintiffs' exercise of their rights to petition the government for redress of grievances.

B. Balancing Injury to Parties:

Plaintiffs assert that they would suffer significantly greater harms under the statute's restrictions than defendants would suffer should the injunction be granted. Plaintiffs claim that polling places provide the highest concentration of registered

voters, who are precisely the signatories required under Florida statute in order to place the Petition on the ballot. (Doc. #2, p. 22.) Plaintiffs further argue that "door-to-door canvassing and shoppingmall [sic] solicitation are poor and impractical alternatives for purposes of collecting large numbers of signatures for registered voters," and that the farther plaintiffs get from the polling place exit, the less likely they are to interact with a voter. (*Id.* (citing *Committee for Sandy Springs, Inc. v. Cleland*, 708 F. Supp. 1289, 1291 (N.D. Ga. 1988); *CBS, Inc.*, 681 F. Supp. 794, 799-800 (S .D. Fla. 1988)).

Defendants claim that plaintiffs' injury is "hardly substantial" and that on balance, the imposition of a preliminary injunction would "not be a measured response to [p]laintiffs' claims that their signature gathering would be more efficient closer to the polling place door." (Doc. #11, p. 19.) As discussed above, it is not clear from the record in this case that the issuance of a preliminary injunction will substantially harm defendants, or that denial of plaintiffs' requested relief is necessary to protect defendants' legitimate interests. Furthermore, as plaintiffs indicate, "a number of readily available means, short of an outright ban on solicitation, can be employed to protect the integrity of the election process." (Doc. #2, p. 24 (quoting *Florida Committee*, 682 F. Supp. at 1543).) Thus, the Court finds that plaintiffs have shown that they will suffer relatively more harm from the denial of a preliminary injunction than defendants would suffer should relief be granted.

C. Public Interest:

Defendants assert, legitimately, that Florida has an interest in "protecting voters from harassment and intimidation at their polling places . . . [and in] protect[ing] the orderly administration of elections and the election process." (Doc. #11, p. 20.) Defendants further argue that the issuance of a preliminary injunction runs counter to this public interest. Defendants claim that "Florida's interest in maintaining a limited protected zone around polling places is substantial," and that plaintiffs' "purported needs cannot justify the invalidation of Florida's critical protected zone around polling places." (Doc. #11, p. 20.) Plaintiffs disagree, stating that "[b]ecause freedom of speech is a cherished right in American society, those activities that promote the exercise of this fundamental right are clearly in the public interest." (Doc. #2, p. 24.)

The Court finds that the public interest would be furthered by granting a preliminary injunction to enjoin enforcement of the statute and to allow plaintiffs' requested form of exit petition circulation, without unduly burdening the State's interest in preventing voter intimidation or erosion of integrity in the electoral process. As in *Florida Committee*, impeding plaintiffs from asking their fellow citizens to join them in proposing an amendment defeats the public interest in robust debate on public issues. 682 F. Supp. at 1543. *See also*, *Clean-Up '84*, 582 F. Supp. at 127 ("All citizens have an interest in a robust debate on public issues."). Further, the Court agrees with plaintiffs' argument that "not only will a preliminary injunction serve [p]laintiffs' interest in

exercising their rights, it will also serve the interests of the citizens and registered voters of the City of Fort Myers in receiving communications of the sort proffered by [plaintiffs]. (Doc. #2, p. 25 (citing *University Books & Videos, Inc. v. Metropolitan Dade County*, 33 F. Supp. 2d 1364, 1374 n.11 (S.D. Fla. 1999).)

Accordingly, it is now

ORDERED:

Plaintiffs' Motion for Preliminary Injunction (Doc. #2) is **GRANTED** in part. A preliminary injunction will issue separately.

DONE AND ORDERED at Fort Myers, Florida, this 22nd day of August, 2008.

/s John E. Steele

JOHN E. STEELE
UNITED STATES DISTRICT JUDGE

Copies: Counsel of record

Filed
2008 AUG 22 AM 11:15
U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

CITIZENS FOR POLICE ACCOUNTABILITY POLITICAL COMMITTEE, and FLORIDA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR ADVANCEMENT OF COLORED PEOPLE,

Plaintiffs,

vs. Case No. 2:08-cv-635-FtM-29SPC

KURT S. BROWNING, in his capacity as Secretary of State of the State of Florida, and SHARON L. HARRINGTON, in her official capacity as Supervisor of Elections, Lee County,

Defendants.

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PRELIMINARY INJUNCTION

This matter came before the Court on Plaintiffs' Motion for Preliminary Injunction (Doc. #2) filed on August 11, 2008. Plaintiffs sought to enjoin enforcement of Florida Statute § 102.031(4) (a)-(b) (2008) on the basis that it is facially unconstitutional and unconstitutional as applied to plaintiffs' petition

circulation activities. The Court heard oral arguments on August 21, 2008, and has entered an Opinion and Order contemporaneously with this Preliminary Injunction setting forth its findings. The Court finds, as more fully set forth in that Opinion and Order, which is incorporated herein, the following:

1. Plaintiffs have established that they are substantially likely to succeed on the merits of their First Amendment claim as it relates to the as-applied challenge to Florida Statute § 102.031(4) (a)-(b) (2008);

2. Plaintiffs have established that there is a substantial threat of irreparable injury absent the granting of a preliminary injunction prohibiting enforcement of Florida Statute § 102.031(4) (a)-(b) (2008), as to plaintiff's exit petition activities at polling places and early voting sites during the August 26, 2008 election and its early voting period;

3. Plaintiffs have established that their injury resulting from enforcement of Florida Statute § 102.031 (4) (a) - (b) (2008), as to plaintiff's exit petition activities at polling places and early voting sites, outweighs the potential injury to defendants if the preliminary injunction is granted; and

4. Plaintiffs have established that an injunction barring enforcement of Florida Statute § 102.031(4) (a)-(b) (2008) would not harm or do a disservice to the public interest.

Accordingly, it is now

ORDERED:

1. Defendants Kurt S. Browning, in his capacity as Secretary of State of the State of Florida, and Sharon L. Harrington, in her official capacity as Supervisor of Elections, Lee County, Florida, and their officers, agents, servants, employees, and attorneys, whether acting alone or in concert with others, are prohibited and enjoined from enforcing or threatening to enforce Florida Statute § 102.031(4)(a)-(b) (2008) as to Plaintiffs' peaceful, orderly and non-disruptive (1) solicitation of signatures (2) for their petition to place an amendment of the Fort Myers City Charter on a future ballot (3) from voters at polling places and early voting sites (4) after the voters have voted (5) during the August 26, 2008 election and its early voting period.

2. This preliminary injunction shall not in any way restrain those persons, whose duty it is to police the polling places and early voting sites, from the performance of their duty to protect voters or prospective voters from interference with the free exercise of their right to vote; and

3. The Court finds that no surety bond need be posted by plaintiffs.

DONE AND ORDERED at Fort Myers, Florida, this 22nd day of August, 2008.

/s John E. Steele

JOHN E. STEELE
UNITED STATES DISTRICT JUDGE

Copies: Counsel of record

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEP 04 2009
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No.08-15115-DD

CITIZENS FOR POLICE ACCOUNTABILITY POLITICAL COMMITTEE, FLORIDA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Plaintiffs-Appellees,

versus

KURT S. BROWNING, in his capacity as Secretary of State of the State of Florida, SHARON L. HARRINGTON, in her official capacity as Supervisor of Elections, Lee County,

Defendants-Appellants.

On Appeal from the United States District Court for the Middle District of Florida

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before: DUBINA, Chief Judge, EDMONDSON and HILL, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s J.L. Edmonson

UNITED STATES CIRCUIT JUDGE

ORD-42
(2/05)